

Federal Court



Cour fédérale

**Date: 20120720**

**Docket: T-2078-11**

**Citation: 2012 FC 921**

**Ottawa, Ontario, July 20, 2012**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**GORDON PARGELEN**

**Applicant**

**and**

**ATTORNEY GENERAL  
OF CANADA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] After serving his last of many sentences for sexual assault, some of which included physical violence and kidnapping, Mr. Pargelen was placed under the long-term supervision of the National Parole Board, the whole in accordance with section 752 and following of the *Criminal Code*. The term of this supervision runs from 2009 through to 2015.

[2] Depending on his progress, or lack of same, various special conditions have been imposed, removed, or replaced from time to time.

[3] This judicial review is of three special conditions imposed 22 November 2011. They are:

[...] Not to own, use or possess a computer, as defined in section 342.1 of the *Criminal Code*, or any technological device that would allow you unsupervised access to the internet, except for working purposes.

[...] Refrain from possessing or using wireless telecommunication devices, except for working purposes.

[...] Provide documented financial information to the satisfaction of your parole supervisor as per a schedule to be determined by your parole supervisor regarding expense information and financial transaction information.

[4] There were other special conditions imposed which are not under challenge.

[5] Shortly before the hearing in this Court, the Board withdrew two of the three special conditions in issue, the ones relating to computers and wireless telecommunication devices. Other special conditions were imposed, including a direction that he reside at a community correctional centre or approved facility for a period of six months. As a result, the Attorney General, on behalf of the Board, submits that this judicial review should be limited to the financial reporting special condition, as the other two conditions are now moot. Counsel for Mr. Pargelen submits that there is an important point of law involved so that the Court, in its discretion, should nevertheless review all three special conditions.

## **THE FACTS**

[6] The three special conditions in issue were imposed in a detailed set of reasons issued by the Board. The report sets out in painful detail his various convictions, primarily involving physical and sexual assault of children. He has been assessed as being at extremely high risk for sexual re-offending. His supervision has been subject to various suspensions because of his inappropriate behaviour. At the conclusion of the analysis, the Board explained why it was imposing the three special conditions in issue:

At the hearing, you mentioned that you comply with the obligation to disclose your pay checks. However, your parole officer mentioned that this good behaviour is recent and that you have refused to co-operate with your CMT during a long time regarding this matter. The Board considers important to supervise your financial transactions, namely your expenses. Moreover, your supervisor must be informed about your acquisitions considering that you have been found in possession of telecommunication devices without authorization. Consequently, you will have to provide documented financial information to the satisfaction of your parole supervisor, as per a schedule to be determined by your parole officer, regarding expense information and financial transaction information.

You have been involved in sexual offences against children. It is important to supervise the use of any technological device allowing you access to the Internet. Consequently, you will be forbidden to own, use or possess a computer, as defined in section 342.1 of the *Criminal Code*, or any technological device that would allow you unsupervised access to the internet, except for working purposes. For the same reason, you will have to refrain from possessing or using wireless telecommunication device, except also for working purposes. These measures will permit a strict supervision of the use of these devices.

These conditions are necessary and reasonable to protect society and help you with your social reintegration.

[7] The Court was provided with the Board's more recent decision for information purposes only. It, in itself, is not subject to this judicial review. However, it bears noting that, in theory, in any

event, Mr Pargelen's access to computers and wireless internet devices are restricted while at a halfway house. It may well be, of course, that these conditions will be re-imposed once the current 180-day term at a halfway house expires in about five months time.

## **ISSUES**

[8] This case gives rise to the following three issues:

- a. Should the Court render a decision with respect to the special conditions which are currently withdrawn?
- b. What is the standard of review? Mr. Pargelen submits that what is at issue is an interpretation of law, subject to the correctness standard, without any deference owed to the Board. The Attorney General submits that the reasonableness standard applies.
- c. How closely must the special conditions be connected to the offences for which convictions were obtained?

## **DISCUSSION**

### a. Mootness

[9] The record shows that the special conditions imposed upon Mr. Pargelen vary from time to time depending on his progress in reintegration or lack of same. He had been previously subject to a 180-day term in a halfway house, which term had expired, but has again been re-imposed. That condition has a direct connection to his access to computers and to wireless communications during

non-working hours. In the circumstances, nothing is to be gained by assessing the decision of the Board, irrespective of the standard of review. The application is moot on those points.

[10] Should the controversy become live again, it will have to be based, to some extent, on different facts. In the circumstances, I decline to exercise my discretion (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 92 NR 110). In any event, the issue underlying all three of the special conditions is the extent to which the conditions must be connected to the offender's convictions. That issue is in even better focus in the financial reporting special condition, which shall be dealt with.

#### b. Standard of Review

[11] Mr. Pargelen relies upon the decision of Mr. Justice Zinn in *Dixon v Canada (Attorney General)*, 2008 FC 889, [2009] 2 FCR 397, in which he held that on questions of law involving the *Corrections and Conditional Release Act*, the standard of review of decisions of the National Parole Board is correctness. In my opinion, that case is distinguishable in that I consider the decision in issue here to be a mixed one of both fact and law, which is subject to the reasonableness standard. Furthermore, it is clear from Mr. Justice Zinn's reasoning that he considered the decision under review before him to be absurd. That is to say, it would have been set aside even on a reasonableness standard.

[12] The Supreme Court is leaning more and more to the proposition that deference is owed to decision makers dealing with points of law pertaining to their home statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654). In

light of how I have characterized the decision, it is unnecessary, and not helpful, to opine as to the standard of review applicable to decisions of the Board on pure points of law relating to the Act, as well as regulations and policy guidelines thereunder.

c. Relationship Between the Offence and Special Conditions Imposed

[13] As stated in section 100.1 of the Act, the protection of society is the paramount consideration for the Board. Principles guiding the Board with respect to conditional releases are set out in section 101 of the Act. The Board is to take into consideration assessments provided by correctional authorities. Its decisions are to be consistent with the protection of society “and that are limited to only what is necessary and proportionate to the purpose of conditional release”. Section 134.1 of the Act sets out conditions for long-term supervision, the particulars of which are set out in section 161(1) of the *Corrections and Conditional Release Regulations*, with such modifications as the circumstances require. Section 161 of the Regulations sets out a number of general conditions which include reporting any change in employment and the offender’s financial situation.

[14] In addition to such general conditions, in accordance with section 134.1(2) of the Act, the Board may establish special conditions “that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.”

[15] At the heart of Mr. Pargelen’s submissions are paragraphs 7 through 9 of section 7.1 – Release Conditions of the *National Parole Board Policy Manual*, they read:

7. A special condition may be imposed only when the condition is considered reasonable and necessary in

7. Une condition spéciale peut être imposée seulement lorsqu’elle est jugée raisonnable et nécessaire pour protéger la

order to protect society and to facilitate the successful reintegration into society of the offender.

société et favoriser la réinsertion sociale du délinquant.

8. Board members will be satisfied that without the assistance and control afforded by compliance with the special condition, the offender presents an undue risk to reoffend. There must be a clear link between the condition and the probability of reoffending if the condition is violated.

8. Les commissaires doivent être persuadés que, sans l'aide et le contrôle assurés par le respect de la condition spéciale, le délinquant présentera un risque inacceptable de récidive. Il doit y avoir un lien clair entre la condition imposée et la probabilité de récidive si la condition n'est pas respectée.

9. A special condition must relate directly to risk, to a need identified in the decision documentation or to behaviour that the Board members consider inappropriate or unacceptable. The condition must be one that can be complied with and that can be monitored and enforced by the parole officer. Board members should ensure that special conditions do not contradict court orders.

9. Une condition spéciale doit être directement liée au risque que présente le délinquant, à un besoin du délinquant tel qu'exposé dans la décision ou à un comportement que les commissaires jugent inapproprié ou inacceptable. Il doit s'agir d'une condition que le délinquant peut respecter et que l'agent de libération conditionnelle peut surveiller et faire appliquer.

[16] Mr. Pargelen's counsel emphasizes that the financial reporting requirement does not relate directly to the risk of recidivism based on previous convictions.

[17] Counsel suggests that in the light of the recent decision of the Supreme Court in *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295, the guidelines have the force of law. That case related to policies of two transportation authorities to the effect that they would permit commercial, but not political, advertising on their vehicles. The question was whether the *Canadian Charter of*

*Rights and Freedoms* applied and whether this policy imposed a reasonable restriction under section 1 thereof. Paragraph 65 was quoted, it provides:

Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is “prescribed by law”.

[18] I do not think this case is helpful to Mr. Pargelen. The entire Act, Regulations and Policy are strictly in accordance with the *Charter*. If the Policy went beyond the Act and the Regulations, then it could well be argued that it is capricious.

[19] The submission is that the special condition with respect to financial reporting does not relate directly to the risk to society posed by Mr. Pargelen. However, paragraph 9 also provides that the condition relate to behaviour considered inappropriate or unacceptable.

[20] In this particular case, the record shows that there are four factors relating to Mr. Pargelen’s risk of recidivism. They are:

- a. his sexual deviance;
- b. his relationship with other people, particularly women;
- c. his anger management; and
- d. his lack of cooperation.

[21] More particularly, the record indicates that in the past he had used money for improper purposes, such as purchasing wireless communication equipment, contrary to a condition then imposed. There are several other instances of his lack of cooperation.



[22] In my opinion, the decision of the Board that Mr. Pargelen's behaviour was inappropriate or unacceptable was reasonable and that the special condition imposed directly relates thereto.

[23] The manual is not law as such. I share the view expressed by Mr. Justice Lemieux in *Sychuk v Canada (Attorney General)*, 2009 FC 105, 340 FTR 160, affirmed 2010 FCA 7, 399 NR 12, at paragraph 11, where he reiterated the principle that manuals do not have the force of law but nevertheless such directives do furnish indications of what is reasonable in a discretionary context.

[24] In one sense, Mr. Pargelen submits that the manual restricts the discretion given to the Board pursuant to section 134.1 of the Act. I cannot subscribe to that view. The history of the section was discussed by the Federal Court of Appeal in *Normandin v Canada (Attorney General)*, 2005 FCA 345, [2006] 2 FCR 112. At issue was whether the discretion set out in section 134.1 was, as a matter of statutory interpretation, restricted by more specific provisions within the Act. As Mr. Justice Létourneau stated at paragraph 29 thereof:

Subsection 134.1(2) of the Act, cited by the Board as authority for imposing a residence requirement, contains a general power to ensure the protection of society and facilitate the successful reintegration into society of a long-term offender by imposing on him the conditions of supervision that the Board considers reasonable and necessary for this purpose. This general power, in my opinion, is not precluded by the more specific provisions in sections 99.1, 134.1, 135.1 and subsection 133(4.1) of the Act. I will return later to the mutual interrelationship of these provisions. Suffice it to say at present that I agree with the remarks by Russell J. in *McMurray v. Canada (National Parole Board)*, 2004 FC 462, reproduced in the instant case by Tremblay-Lamer J.

[25] If other sections of the Act do not have the effect of restricting the Board's discretion, certainly its own manual cannot be interpreted in such a way.

**COSTS**

[26] Mr. Pargelen submits that since an important issue of law was involved, costs should not be awarded against him in the event that his application is dismissed. While I do not agree with that proposition, he was required to put in time and effort on two issues which have become moot. In the circumstances I shall fix costs in a lump sum of \$500, all inclusive.

**LANGUAGE**

[27] Mr. Pargelen's first language is English. He selected that language as his language of communication with the Board and so the record under review is in English. As a matter of convenience to counsel, the judicial review was heard in French. However, Mr. Pargelen requested that reasons be first issued in English, and so it shall be.

**ORDER**

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that:**

1. The application for judicial review is dismissed.
2. The whole with costs in favour of the respondent fixed at \$500.

“Sean Harrington”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2078-11

**STYLE OF CAUSE:** PARGELEN v AGC

**PLACE OF HEARING:** MONTREAL, QUEBEC

**DATE OF HEARING:** JULY 10, 2012

**REASONS FOR ORDER  
AND ORDER:** HARRINGTON J.

**DATED:** JULY 20, 2012

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